

## NOTICE OF OPEN MEETING

Notice is given that a **Regular Meeting** of the Board of Directors of the Barton Springs/Edwards Aquifer Conservation District will be held at the **District office**, located at 1124 Regal Row, Austin, Texas, on **Thursday, October 11, 2018**, commencing at **6:00 p.m.** for the following purposes, which may be taken in any order at the discretion of the Board.

Note: The Board of Directors of the Barton Springs/Edwards Aquifer Conservation District reserves the right to meet in Executive Session at any time during the course of this meeting to discuss any of the matters listed on this agenda, as authorized by the Texas Government Code Sections §551.071 (Consultation with Attorney), 551.072 (Deliberations about Real Property), 551.073 (Deliberations about Gifts and Donations), 551.074 (Personnel Matters), 551.076 (Deliberations about Security Devices), 551.087 (Economic Development), 418.183 (Homeland Security). No final action or decision will be made in Executive Session.

**1. Call to Order.**

**2. Citizen Communications (Public Comments of a General Nature).**

**3. Routine Business**

**a. Consent Agenda.** *(Note: These items may be considered and approved as one motion. Directors or citizens may request any consent item be removed from the consent agenda, for consideration and possible approval as a separate item of Regular Business on this agenda.)*

- 1. Approval of Financial Reports under the Public Funds Investment Act, Directors' Compensation Claims, and Specified Expenditures greater than \$5,000. Not for public review**
- 2. Approval of minutes of the Board's September 27, 2018, Regular Meeting and Public Hearing. Not for public review at this time**
- 3. Approval of amending the contract for Holland Groundwater Management Consultants LLC to add an additional \$15,000. Pg. 9**
- 4. Approval of alternative dates for the November and December Board meetings and set the date for the District Holiday Party. Pg. 10**

**b. General Manager's Report.** *(Note: Topics discussed in the General Manager's Report are intended for general administrative and operational information-transfer purposes. The Directors will not take any action unless the topic is specifically listed elsewhere in this agenda for consideration.)*

**1. Standing Topics.**

- i. Personnel matters**
- ii. Upcoming public events of possible interest**
- iii. Aquifer conditions and status of drought indicators**

**2. Special Topics.** *(Note: Individual topics listed below may be discussed by the Board in this meeting, but no action will be taken unless a topic is specifically posted elsewhere in this agenda as an item for possible action. A Director may request an individual topic that is presented only under this agenda item be placed on the posted agenda of some future meeting for Board discussion and possible action.)*

- i. Review of Status Update Report – at directors’ discretion. **Pg. 12**
- ii. Update on certain projects and activities of individual teams.
- iii. Update on activities related to the Travis County ILA.
- iv. Update on Board committee activity.
- v. Update on various development activity over aquifer recharge and contributing zones.
- vi. Update from legal counsel on two recent Attorney General opinions affecting groundwater conservation districts. **Pg. 17**
- vii. Update on activities related to area roadway projects.

**4. Discussion and Possible Action.**

- a. Discussion and possible action related to a declaration of “No Drought” conditions. **Pg. 28**
- b. Discussion and possible action related to setting District Objectives for FY 2019. **Pg. 30**
- c. Discussion and possible action on possible remand of Needmore LLC permit application to the State Office of Administrative Hearings for further proceedings prior to scheduling a final hearing on the application before the District’s board of directors; discussion and possible action on scheduling final hearing on the application. **NBU**

**5. Directors’ Reports.**

Directors may report on their involvement in activities and dialogue that are of likely interest to the Board, in one or more of the following topical areas:

- Meetings and conferences attended or that will be attended;
- Board committee updates;
- Conversations with public officials, permittees, stakeholders, and other constituents;
- Commendations; and
- Issues or problems of concern.

**6. Adjournment.**

**Please note:** This agenda and available related documentation, if any, have been posted on the District website, [www.bseacd.org](http://www.bseacd.org). If you have a special interest in a particular item on this agenda and would like any additional documentation that may be developed for Board consideration, please let staff know at least 24 hours in advance of the Board Meeting so that we can have those copies made for you.

The Barton Springs/Edwards Aquifer Conservation District is committed to compliance with the Americans with Disabilities Act (ADA). Reasonable accommodations and equal opportunity for effective communications will be

provided upon request. Please contact the District office at 512-282-8441 at least 24 hours in advance if accommodation is needed.

**Item 1**

**Call to Order**

**Item 2**

**Citizen Communications**

## **Item 3**

### **Routine Business**

#### **a. Consent Agenda**

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- 3. Approval of amending the contract for Holland Groundwater Management Consultants LLC to add an additional \$15,000.**
- 4. Approval of alternative dates for the November and December Board meetings and set the date for the District Holiday Party.**

**Amendment No. 1 to the Contractual Agreement for  
Professional Consulting Services Between  
Barton Springs/Edwards Aquifer Conservation District  
and  
Holland Groundwater Management Consultants LLC**

This is Amendment No. 1 to the contract ("Agreement") between the Barton Springs/Edwards Aquifer Conservation District (hereinafter "District" or "BSEACD"), and Holland Groundwater Management Consultants LLC, as contractor (hereinafter "Contractor") dated February 10, 2018. This amendment increases the not-to-exceed dollar amounts from \$43,000.00 to \$58,000.000. All other provisions will remain as in the existing Agreement, as amended.

Amendment No. 1 is entered into by the District and the Contractor as evidenced by the signatures below. Sections II, of the Agreement are amended as follows below. Except as specified in this Amendment, all other provisions of the Contractual Agreement as previously amended continue.

**Section II  
Scope, Compensation and Deliverables**

Hereinafter, Section II shall be modified by changing the last sentence in Section II to read as follows:

"In no event will the District's total aggregated cost, including Contractor's expenses, paid to Contractor under both Phases of this Agreement, exceed \$58,000 without prior written approval of the District."

No Other Changes to the Agreement are Hereby Authorized.

The parties have executed this agreement in Austin, Texas, on the \_\_\_\_\_ day of October 2018.

**For Barton Springs/Edwards Aquifer  
Conservation District,**  
The District:

**For W. F. (Kirk) Holland,**  
Contractor:

\_\_\_\_\_  
Blayne Stansberry  
Board President

\_\_\_\_\_  
Date

\_\_\_\_\_  
W F (Kirk) Holland  
Principal of Contractor

\_\_\_\_\_  
Date

**Attest:**

**Approved as to Form:**

\_\_\_\_\_  
Blake Dorsett  
Board Secretary

\_\_\_\_\_  
Date

\_\_\_\_\_  
William D. Dugat, III  
Counsel

\_\_\_\_\_  
Date



**Barton Springs  
Edwards Aquifer**  
CONSERVATION DISTRICT

**MEMORANDUM**

**Date:** October 5, 2018  
**To:** Board of Directors  
**From:** Tammy Raymond  
**Re:** Alternative dates for Board Meetings

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Suggested dates for Board Meetings:

November - November 8<sup>th</sup>  
December - December 13<sup>th</sup>

Holiday Open House: December 14th



## Item 3

### Routine Business

**b. General Manager's Report.** *(Note: Topics discussed in the General Manager's Report are intended for general administrative and operational information-transfer purposes. The Directors will not take any action unless the topic is specifically listed elsewhere in this agenda.)*

#### 1. Standing Topics.

- i. Personnel matters and utilization
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- iii. Aquifer conditions and status of drought indicators

2. Special Topics. *(Note: Individual topics listed below may be discussed by the Board in this meeting, but no action will be taken unless a topic is specifically posted elsewhere in this agenda as an item for possible action. A Director may request an individual topic that is presented only under this agenda item be placed on the posted agenda of some future meeting for Board discussion and possible action.)*

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- vii. Update on activities related to area roadway projects.

STATUS REPORT UPDATE FOR OCTOBER 11, 2018 BOARD MEETING

Prepared by District Team Leaders

Leader, Staff	Date	PROJECT / ACTIVITY DESCRIPTION	STATUS/COMMENTS
<b>GENERAL MANAGEMENT TEAM</b>			
Alicia Reinmund-Martinez			
ARM	10/5/2018	Meetings, Training, Presentations, and Conferences	External Meetings Attended: TWCA Groundwater Committee meeting, CAPCOG General Assembly, Colorado River Alliance Barstow Lunch, Sheld Ranch tour, City of Buola CM and ACM meeting, SBCA Oak Hill Parkway initiative. Other meetings: ITGCD monitoring collaboration, EP preliminary hearing, Needmore process meeting. Teleconference calls: Kirk Holland, Conferences/Seminars: HCA Leadership Summit
ARM	10/5/2018	Ongoing Special Projects, Committees, and Workgroups	Ongoing Special Projects: Continue conversations on HCP Year one implementation, ASR Concepts, EPM. Worked with Team leaders to develop FY19 Goals/Objectives. Committees and Workgroups: Regional Water Quality meeting.
ARM	10/5/2018	Routine Activities and Day-to-Day operations	Routine Activities/Day-to-Day Operations: provided general oversight of staff activities and oversight of day-to-day operations; approved admin documents; prepared agendas and backup for Board meeting; prepared GM report and assigned tasks; led one Planning team meeting; served as liaison between Board and staff. Consultation with Attorney on: EP and Needmore permit application, September 27 and October 11 meeting agenda. Other Activities: Consultation with Benefits and HR coordinator.
<b>ADMINISTRATION TEAM</b>			
Dana Christine Wilcox			
DCW	10/5/2018	Permittee accounts carrying a past due balance:	The first billing cycle for FY 2019 were mailed out on August 16th. (The second monthly billing cycle went out on September 14th.) This is the largest billing cycle of the year because it includes the permits that pay annually (only one billing per year). As of 9.21.2018, there are currently 13 past due invoices. UPDATE: As of 10/1 there are only 3 remaining past due invoices.
DCW	10/5/2018	October monthly billings.	15 monthly invoices for \$29,147.05 mailed out on September 14, 2018. City of Buola has changed from quarterly invoicing to the monthly cycle.
DCW	10/5/2018	Drought Management Fees	First fee assessment will be in November (fees don't kick in until after first two full months of drought.)
VE/DCW	10/5/2018	Currently preparing for the annual report and possibly new formatting.	This includes compiling appendix B for the annual report which references the management plan. We are also incorporating the HCP into the reporting in these two documents.
DCW	10/5/2018	Preparing the annual workers' compensation payroll audit through R Dylong & Associates in Rockwall TX for the Texas Municipal League (TML) who handles our workers' compensation insurance policy (along with all of our other District insurances, excluding health policies).	This audit uses completely separate figures than the usual and customary District quarterly figures. This audit uses calendar year (tax) quarters so it requires a separate assessment. This audit is done by Gary Goforth. This is completed via telephone calls, which is customary and usual. This process started on 10.5.2018.
DCW	10/5/2018	Preparing the Management Discussion and Analysis, a required component of the audit report.	The MD&A is a very important part of the audit report. It provides an overview of the previous year of operations, contains useful information, and touches on the upcoming year and future projects.
DCW	10/5/2018	Currently preparing for the annual financial audit which includes closing the books for FY 2018, among many other tasks.	Expect to begin the audit some time in late October.

	Leader, Staff	Date	PROJECT / ACTIVITY DESCRIPTION	STATUS/COMMENTS
Conservation Credits Analysis, and Overpumpage	SD	10/5/2018	Analysis completed and presented to Board at September 27 meeting, where they were approved.	Now we will ask for comp scholarship domains from these permittees of their conservation credits.
Financial Reporting - Website	DCW	10/5/2018	Most current, available financial reports to be posted.	Balance Sheet, Profit and Loss Statements, and Check Registers through August 2018 have been posted on the District website.
Tax Reporting	DCW	10/5/2018	Quarterly payroll taxes for Jul/Aug/Sept 2018 submitted to Texas Workforce Commission, and the United States Treasury on 10.5.18 (due by October 31.)	TWC C-3, and 941.
Trust Accounting - Third-party retirement administrator The Standard	DCW	10/5/2018	Annual Trust Accounting in process.	Annual compliance testing and compliance testing date validation with employee census data. Will take 45 days. Will submit completed compliance testing to the State Pension Review Board as required by law.
TEXpers Annual Membership	DCW	10/5/2018	TEXpers renewal (Texas Association of Public Employee Retirement Systems)	Renewal amount is based on assets, specifically the total market value of our retirement funds which include 3 main categories (guaranteed contracts once known as short-term investments, mutual funds/equity, and mutual funds/fixed income) for a total investment amount/market value. (Dues changed from a .000005 formula to a flat rate of \$25.00). Current retirement funds total for eligible employees and also some ex-employees is \$ 2,656,381. Last year's total was \$ 2,200,621.
<b>REGULATORY COMPLIANCE TEAM</b> V. Jasso Escobar				
Rutherford North	KBE, VE	10/5/2018	Test Well Permit	Giles Water Resources Corp submitted two test well applications for the Rutherford North property. They are requesting to drill one middle Trinity and one Lower Trinity well to assess the production capabilities and water quality of the formations. Those applications are under review. Staff met with the consultant hydrogeologist who informed staff that due to complication with Trinity wells, the well would be constructed to final completion and used for monitoring wells after tested. We have asked him to fill out a monitoring well application. This application is set to automatically expire on 10/11/18 if it remains incomplete.
Electro Purification	KBE, VE	10/5/2018	Production Permit	EP has submitted 7 modification applications and 1 production permit application on 7/13/17. The production request is for 912,500,000 million gallons a year (2.5 MGD) to be produced from the Middle Trinity Aquifer for the purposes of Wholesale Public Water Supply. The General Managers Preliminary Finding was sent out of the applicant on 2/20/18. A 90-day extend review period was granted to allow the applicant to provide additional required materials such as a compliance monitoring plan for the avoidance of unreasonable impacts. The GM's Position Statement became available on May 20, 2018. The public comment period runs from June 4th - June 25th. The District hosted public information session on June 18, 2018 from 6-8pm at Wimberley Community Center. The 20 day comment period closed on June 25th. Staff received more than 300 comments and 12 request for a contested case. On July 12, The Board made a decision to send the matter to SOAH for hearing. The date for the preliminary hearing at SOAH was September 17th 2018. This was to be a hearing to decide which parties have standing, and the merit of the application were not heard at this hearing. The ALJ has requested briefs from the parties and will be reviewing those briefs to form her decision on party standing. The briefs will be produced in October 2018.

	Leader, Staff	Date	PROJECT / ACTIVITY DESCRIPTION	STATUS/COMMENTS
Needmore Water LLC	KBE, VE	10/5/2018	Conversion of a Temporary Permit to a Regular Permit	Needmore Water LLC is currently a Temporary Permit that has been determined to be administratively complete. Public notice was published on 11/29/16 and comment period closed on 12/19/16. The District received a request for a contested case hearing from both the applicant and TESPA. TESPA requested the hearing to go before the State Office of Administrative Hearings (SOAH). BSEACD Board decided that the preliminary hearing to determine party status will be heard by SOAH. The General Manager has provided a Preliminary Decision with recommended Special Provisions, and a Technical Evaluation, that is available on the website www.bseacd.org. A preliminary hearing on party standing was held on 7/31/17 at SOAH. TESPA was granted party status. An initial hearing on the merits of the permit application took place March 5th 2018. As of 6/7/18 the ALJ has ruled in the pending Needmore matter granting Needmore's Motion for Summary Disposition and denying TESPA's motion. The ALJ agreed with Needmore on this point and concluded there are no issues to consider in the SOAH proceeding. The July hearing was cancelled and the ALJ drafted a proposal for decision. The parties requested the ALJ to further clarify the PFD and provide a recommendation on the merits of the application. A public hearing on the application may not be scheduled on 10/25/18 as previously anticipated, and the future schedule is contingent on Board discussions at the 10/11/18 Board Meeting.
ASR Rulemaking	KBE, VE	10/5/2018	Rule Making /Technical Workgroup	The Regulatory staff and Aquifer Science staff held a technical workgroup meeting in early December 2017. This meeting was a discussion amongst technical ASR experts, interested ASR users, and District Technical staff. The discussion was focused on regulatory and permitting concepts along with a brief update on current ASR activity within the District. The workshop notes and summary are coming together; staff provided an update to the Board subcommittee on 9/13/18 Board Meeting and will schedule another committee update in mid November to refine a few new concepts.
SI45 SW/Mopac Intersections	KBE, VE	10/5/2018	Consent Decree/Roadway Projects	Next Site Inspection: District staff is coordinating with TxDOT staff on regular visits to the Mopac project site for geologic inspections. The District's consultant (Dave Fowler) and staff (VE) performed roadway inspections of both the Mopac Intersections project and the SI 45SW project. Both projects have been maintaining their stormwater and construction BMPs to a very high standard, and no significant issues occurred during the September storm events.
Database Development	KBE, VE	10/5/2018	Intra Contract - Database Development	Intra is providing biweekly updates and status reports on their progress. They are currently in the design/prototype phase where the look and feel is still being developed. Intra had a meeting with District staff to discuss the alpha version and has scheduled followup meetings with individual teams over the recent months. To ensure that the project is moving forward in a timely fashion, there is a weekly progress report conference call that staff has with the contractor and various action items are continuously discussed.
General Manager Approved Permits	KBE, VE	10/5/2018	Individual Permits < 2,000,000 gal/yr	Staff received an application for an irrigation well (Matthew Sitocenberg). The application is under review.
Drought Stage- Alarm Drought	KBE, VE	10/5/2018	Drought Compliance Monitoring and Enforcement	Alarm Stage Drought was declared on July 12, 2018 and curtailments became effective on August 1, 2018. Letters and emails to all permittees have been sent out for notification of drought. Staff has been assisting permittees as they call in with questions related to drought curtailment requirements. Drought is steadily improving and it is possible that the District may come out of drought in October.
<b>EDUCATION &amp; OUTREACH TEAM</b>				
Travis County ILA	RG, LC, BH, JV, BAS	10/5/18	Data processing and program prep	Travis County ILA: Data compilation has begun for the focus area. Data downloads, extraction, and processing have been the main tasks. Staff have been working to georeference newly available geology datasets, extract water level data from the TWDB GW database, finalize and roll out the fall Travis County Neighborhood Site Visit campaign, and compile geophysical logs and well completion info for a cross section.

	Leader, Staff	Date	PROJECT / ACTIVITY DESCRIPTION	STATUS/COMMENTS
Augmented Reality Water Quality Teaching Tool	RG, JV	10/5/18	Benthic macroinvertebrates	Phase II of the augmented reality water quality indicator game is complete. The app is now available through the App store & the card deck's instruction booklet is the final refinement before decks can be ordered in bulk. We piloted the game with almost 180 fourth grade students from Austin High. Our station was one of many; students piloted the Creek Quest AR game and card deck using iPads looking at indicator species and endangered salamanders to talk about the health of rivers/lakes/streams/aquifers. The decks will be available to the public for purchase through The Game Crafters website and we'll be able to purchase through a wholesale option.
Cave Sim	RG, JV	10/5/18	Potential collaboration on education trailer	As part of Austin Cave Festival, the Colorado-based company, Cave Sim, brought their educational cave trailer. The trailer has cave passages equipped with sensors on "sensitive features" to teach about caves, habitat, recharge, and cultural heritage. Since Cave Festival, several groups have met to discuss the potential of having a Austin-based version that highlights the Central Texas groundwater resources, cave species, and development challenges. The Water Quality Protection Lands program has scheduled CaveSim for their 20th anniversary celebration on Saturday, Oct. 6 and the District is sponsoring a visit to Dallsstrom Middle School on Tuesday, Oct. 9--attending either of these days would be a great opportunity to see the educational trailer in action. Hope to see you there!
eNews	RG, all staff	10/5/18	October edition	An October edition of the eNews should go out mid-month. There continues to be significant increases in new subscribers. Articles will likely include HCP signing, permitting updates, aquifer/drought status, Travis Co Neighborhood Well Site visits program, and Rainwater Revival reminders and invitation to attend.
Internet Traffic Report	RG, JV	10/5/18	Page views and visits to the District Website	The District website had 4,016 total page views by 3,058 unique sessions--a slight decrease from last month. Top sites in order of number of views are the home page (1,168), Drought Status (320), EP Permit Notice (206), Maps (175), Staff (136), and Newsletters (110). The District Facebook page now has 716 (up 4 from last month). 'Likes' and responses to posts have been very positive. The most popular FB posts were about rainfall and recharges (322 views) and Onion Creek flow (138 views).
<b>AQUIFER SCIENCE/TEAM</b>				
Dye Tracing	BS, BH, JC	10/4/18	Dye tracing	Technical summaries of the recent Onion Creek (contributing zone) are completed. A technical summary of the dye trace to Jacob's Well Spring is pending.
Central JIays County Groundwater Evaluation	BH, BS, JC	10/4/18	Well and hydrogeology characterization	AS staff have prepared a technical memo stating that there is a potential for unreasonable impacts from pumping of the EP wells at the requested permit amount. Testing of the multipoint well in Rolling Oaks is continuing as well as continued work enhancing the monitor well network in the EP area.
Antioch Cave	BS, BH, JC	10/4/18	Onion Creek Recharge Enhancement Project	New equipment to control the Antioch valve were installed in March 2017. A new flow meter was installed in March 2018. The vault functioned as designed during the March 2018 rain event.
Water-Quality Studies	BS, BH, JC	10/4/18	Sampling and analysis of groundwater and surface water	District staff have been collecting groundwater samples for several projects including for the TWDB and the Ruby Ranch ASR pilot project.
Saline Zone Studies	BS, BH	10/4/18	Saline Zone report for TWDB grant	Carollo Engineers completed a draft final report for the RFP grant, which was submitted to TWDB on October 31. Aquifer Science staff completed a report of the multipoint well testing and sampling that is a part of the RFP grant report. A final stakeholder meeting was held on November 28. The final report was submitted to the TWDB and is available on the BSEACD website. The final report was accepted by TWDB in March.
Drought and Water-Level Monitoring	BH, BS, JC	10/4/18	Drought status, monitor wells, and synoptic water level events	On July 12, the District's Board of Directors declared Stage II Alarm Drought. On 10/4/18, the Lovchady well had a level of 478.7 (0.3 ft about drought level) and is still rising. Flow at Barton Springs was 72 cfs.

	Leader, Staff	Date	PROJECT / ACTIVITY DESCRIPTION	STATUS/COMMENTS
Information Transfer	BS, BILL JC	10/4/18	Presentations, conferences, reports, and publications	Aquifer Science staff have completed and submitted for review two draft chapters about the Barton Springs segment for a memoir (book) about the Edwards Aquifer to be published in the Fall of 2018. Two abstracts have been accepted for the annual GSA meeting in Indianapolis.
Aquifer Testing	BS, BILL JC	10/4/18	Planning, participation, and review of aquifer tests	EP aquifer testing finished in January 2017. District staff received an application and hydrogeologic report from EP. Staff completed a technical review of EP's production application and produced three technical memos.
Travis County IJA	BS, BILL JC, RG, LC, JV	10/4/18	Hydrogeologic Atlas of Western Travis County	Travis County approved the IJA on 7/3/18 to contribute to studies producing databases and publications characterizing the hydrogeology of Western Travis County.
<b>AD HOC TEAMS</b>				
Technical Team	BAS	10/4/18	Current areas of discussion	Topics of discussion at the technical team meeting in October were drought status, water-level monitoring, Travis County studies, and ASR.
Planning Team	ARM	10/4/18	Strategic and tactical planning and discussion topics	Meeting held October 4, 2018
<b>UPCOMING ITEMS OF INTEREST</b>				
Colorado River Alliance luncheon with Lyle Larsen		10/4/2018		
City of Austin Water Utility - WQ Protection Lands 20th Anniversary Celebration		10/6/2018		
EAA's Distinguished Lecture Series, Dr. Todd Hallihan		10/5/2018		
Cave Sim demonstration		10/9/2018	Dalstrom Middle School	
SWTCGD Board Meeting		10/10/2018		
IITGCD - monitoring collaboration meeting		10/10/2018		
Central Texas Water Environment Network meeting		10/11/2018		
TWCA conference at Wyndham Riverwalk in San Antonio		10/17 - 19/2018		
GMA 10 meeting at EAA's offices in SA		10/18/2018		
City of Buda tour of Antioch		10/19/2018		
IICA Hill Country Living Rainwater Revival Festival		10/20/2018	<a href="http://www.hillcountryalliance.org/rainwaterrevival/">http://www.hillcountryalliance.org/rainwaterrevival/</a>	
Barton Springs University		10/23/2018		
Region K meeting - LCKA's offices		10/24/2018		
TAGD Leadership training - Doubletree Hotel in Austin		10/24/2018		
Project WET Educator Training		10/25/2018		
GSA Annual Conference		11/5 - 7/2018		



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 26, 2018

The Honorable Lyle Larson  
Chair, Committee on Natural Resources  
Texas House of Representatives  
Post Office Box 2910  
Austin, Texas 78768-2910

Opinion No. KP-0217

Re: Authority of the temporary directors of the  
Southwestern Travis County Groundwater  
Conservation District (RQ-0218-KP)

Dear Representative Larson:

You ask several questions about the authority of the temporary directors of the Southwestern Travis County Groundwater Conservation District (“District”).<sup>1</sup> You recount the following facts relevant to your questions. The Legislature created the District with the 2017 enactment of chapter 8871 of the Special District Local Laws Code. *See* Request Letter at 1–2. Seven temporary directors were appointed as directed by chapter 8871. *See id.* at 2; *see also* TEX. SPEC. DIST. CODE § 8871.021(a) (providing for the appointment of temporary directors by specified public officials). Chapter 8871 provides for a May 2018 election to confirm the District and to elect the initial directors. *See* TEX. SPEC. DIST. CODE § 8871.024(a); *see also* Request Letter at 2. The Travis County Commissioners Court approved a loan to the District to enable the District to pay for its share of the May 2018 election. *See* Request Letter at 2. On March 2, 2018, the District’s temporary directors cancelled the election citing concerns about loan costs. *See id.*

Chapter 8871 of the Special District Local Laws Code provides for the creation of a groundwater conservation district in Travis County under Texas Constitution section 59, article XVI. *See* TEX. SPEC. DIST. CODE § 8871.002. It provides for the appointment of seven temporary directors by various public officials. *See id.* § 8871.021(a). The temporary directors serve until the date the initial directors are elected in an election held under section 8871.024, and they generally have “the same permitting and general management powers as those provided for initial and permanent directors” in chapter 8871 and in chapter 36 of the Water Code. *See id.* §§ 8871.021(c), .023(a). Section 8871.024 requires that the “temporary directors shall order an election in the district, to be held not later than the uniform election date in May 2018, to confirm the creation of the district and to elect the initial directors.” *Id.* § 8871.024(a); *see also id.* § 8871.024(c) (providing for application of section 41.001(a), Election Code). “If the [D]istrict’s creation is not confirmed . . . , the candidate who receives a majority of the votes cast at that election for each of the seven positions on the board becomes a temporary director.” *Id.* § 8871.024(e), (f) (distinguishing from temporary directors the terms of “[t]emporary directors

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<sup>1</sup>*See* Letter from Honorable Lyle Larson, Chair, House Comm. on Nat. Res., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Apr. 4, 2018), <https://texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

elected under Subsection (e)"). This second set of temporary directors elected under subsection 8871.024(e) "shall order a subsequent election . . . to confirm the creation of the district and to elect the initial directors not earlier than the uniform election date in May 2020." *Id.* § 8871.024(e). Subsection 8871.025 sets out specific tasks for the second set of temporary directors elected under subsection 8871.024(e) with respect to the initial directors if the District is confirmed. *See id.* § 8871.025(a).

You first ask what legal authority allows the temporary directors to cancel the May 2018 election of directors and voter confirmation of the District. *See* Request Letter at 1. Subsection 8871.024(a) provides that the "temporary directors shall order an election in the district, to be held not later than the uniform election date in May 2018, to confirm the creation of the district and to elect the initial directors." TEX. SPEC. DIST. CODE § 8871.024(a); *see also* TEX. ELEC. CODE § 41.001(a)(2) (providing the uniform election dates). Without context providing otherwise, the word "shall" imposes a mandatory duty. *See* TEX. GOV'T CODE § 311.016(2); *see also* Tex. Att'y Gen. Op. No. MW-380 (1981) at 1 (concluding that "shall" in legislation requiring temporary board of drainage district to call confirmation election imposes a mandatory duty). In subsection 8871.024(a), the Legislature imposed a duty on the temporary directors to call a confirmation and candidate election in May 2018.

Provisions elsewhere in Texas statutes authorize the cancellation of elections but none are applicable here. Water Code section 49.112, generally applicable to water districts, allows for the cancellation of an election "called *at the discretion* of the district," but the mandatory nature of subsection 8871.024(a) means that the May 2018 election is not within the District's discretion. TEX. WATER CODE § 49.112 (emphasis added). Election Code section 2.051 also allows for the cancellation of a candidate election when the candidate is unopposed. *See* TEX. ELEC. CODE § 2.051. You do not tell us whether the candidates for initial directors were unopposed but in light of the duty imposed by subsection 8871.024(a) and the fact that the election is for initial directors, a court would likely find that section 2.051 does not apply here. Election Code section 2.081 allows for the cancellation of an election of a measure where the action "authorized by the voters may not be taken"—or is essentially moot. *See id.* § 2.081. It does not apply here because the confirmation or lack of confirmation of the District is not a moot measure. Absent application of these Water Code and Election Code provisions, we find no authority allowing the temporary directors to cancel the confirmation and candidate election.

Your remaining questions stem from the temporary directors' failure to fulfill their duty to call the May 2018 election. *See* Request Letter at 2–3. You also ask whether the cancellation of the election "either contemporaneously or subsequently terminate[s] all authorities" of the temporary directors and what legal authorities do the temporary directors have. Request Letter at 1. Section 8871.023 enumerates the authority of the temporary directors. *See* TEX. SPEC. DIST. CODE § 8871.023. Subsection 8871.023(a) gives the temporary directors the "same permitting and general management powers" held by the initial and permanent directors under chapter 8871 and chapter 36 of the Water Code. *Id.* § 8871.023(a). Additionally, they have the authority to "enter any public or private property located in the district to inspect" certain wells. *Id.* § 8871.023(b). Subsection 8871.023(c) provides that the temporary directors do not have the authority granted by specific, enumerated provisions of Water Code chapter 36. *See id.* § 8871.023(c). "The temporary directors may regulate the transfer of groundwater out of the district as provided by [the Water



Code] but may not prohibit the transfer of groundwater out of the district.” *Id.* § 8871.023(d). These powers are distinguished from those powers granted to the District in section 8871.101 because the District is unconfirmed. *See* Tex. Att’y Gen. Op. No. MW-380 (1981) at 2–3 (recognizing that district is not created until approved at an election and that the directors cannot exercise powers granted until it is approved).

The sole contingency chapter 8871 anticipates and provides for is the potential need to hold a second confirmation election in the event the voters do not vote for confirmation in May 2018. *See* TEX. SPEC. DIST. CODE § 8871.024(e). Chapter 8871 does not expressly speak to any contingency involving the failure to hold either the confirmation or the candidate election. The provision addressing the temporary directors’ terms states that they hold office until the date the initial directors are elected under an election called under subsection 8871.024. *See id.* § 8871.021(c); *cf. id.* § 8871.024(f) (providing for terms for the contrasting “[t]emporary directors elected under Subsection [8871.024](e)”). Absent any legislative intent regarding the lack of a candidate election, this provision could serve as a basis for a court to conclude that the temporary directors hold office and can exercise those powers expressly given them in subsection 8871.023 until the initial directors are elected. *See generally* Tex. Att’y Gen. Op. No. JC-0569 (2002) at 9 (concluding that authority of unconfirmed groundwater conservation district’s temporary, but elected, directors is limited to that expressly granted to the temporary directors).

You do not suggest that the appointment of the temporary directors by those designated to make the appointments was improper. *See* Request Letter at 2–3; *see also* TEX. SPEC. DIST. CODE § 8871.021. Accordingly, the temporary directors are likely *de facto* officers acting under the color of authority. *See Williams v. State*, 588 S.W.2d 593, 595 (Tex. Crim. App. 1979) (describing a *de facto* officer as “one who acts under color of a known and valid appointment, but has failed to conform to some precedent requirement, as to take the oath, give a bond, or the like” (quotation marks omitted)). As such, the temporary directors’ actions are binding because the “law validates the acts of *de facto* officers as to the public and third persons on the ground that, though not officers *de jure*, they are in fact officers whose acts public policy requires should be considered valid.” *Plains Common Consol. Sch. Dist. No. 1 of Yoakum Cty. v. Hayhurst*, 122 S.W.2d 322, 327 (Tex. Civ. App.—Amarillo 1938, no writ).

Lastly, you ask whether the public officials who appointed the temporary directors may withdraw their appointment, nullifying their respective appointee as a temporary director. *See* Request Letter at 1. Chapter 8871 does not provide any mechanism by which the officials who appointed the temporary directors may withdraw their respective appointment. *See generally* TEX. SPEC. DIST. CODE §§ 8871.001–.157. Absent such express authority, a court would likely conclude that the appointing officials may not withdraw their respective appointments.

Certainly, the Legislature has authority to amend chapter 8871. And though appointing officials may not withdraw their appointment, temporary directors may be subject to removal for misconduct. *See* TEX. CONST. art. V, § 24 (providing for removal of county officers); TEX. LOC. GOV’T CODE §§ 87.011(3), .012(15), .013(2) (defining “official misconduct,” naming which officers may be removed, and listing general grounds for removal); *J.C. Engleman Land Co. v. Donna Irrigation Dist. No. 1*, 209 S.W. 428, 429 (Tex. Civ. App.—San Antonio 1919, writ ref’d) (determining that director of irrigation district is a county officer for removal purposes); *see also*

Tex. Att'y Gen. Op. No. MW-380 (1981) at 2 (suggesting that upon a showing of the requisite intent, a temporary director who fails to call a mandatory election may be found guilty of official misconduct). Additionally, a quo warranto proceeding is a method by which to challenge a de facto officer. See TEX. CIV. PRAC. & REM. CODE §§ 66.001–.003 (providing for a quo warranto action); *Toyah Indep. Sch. Dist. v. Pecos-Barstow Consol. Indep. Sch. Dist.*, 497 S.W.2d 455, 456–57 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.) (recognizing that “[q]uo warranto is held to be the exclusive remedy afforded to the public by which it may protect itself against usurpation or unlawful occupancy of a public office by an illegal occupant”), *cert. denied*, 415 U.S. 991 (1974); see also TEX. WATER CODE §§ 36.301–.310 (Subchapter I, governing performance review and dissolution).

S U M M A R Y

A court would likely conclude that the temporary directors of the Southwestern Travis County Groundwater Conservation District had no authority to cancel the 2018 confirmation and candidate election.

A court would also likely conclude that the temporary directors hold office and can exercise those powers expressly given them in section 8871.023 of the Texas Special District Local Laws Code until the initial directors are elected under section 8871.024.

Absent express authority in chapter 8871, a court would likely conclude that the appointing officials may not withdraw their respective appointments.

Certainly, the Legislature has authority to amend chapter 8871. Other potential options to address the disarray resulting from the absence of the confirmation and director election include removal of the temporary directors for misconduct or a quo warranto proceeding challenging the authority of the temporary directors to hold office.

Very truly yours,



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**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 26, 2018

The Honorable Tracy O. King  
Chair, Committee on Agriculture and Livestock  
Texas House of Representatives  
Post Office Box 2910  
Austin, Texas 78768-2910

Opinion No. KP-0216

Re: Whether a groundwater conservation  
district may amend a historic or existing use  
permit in specific circumstances  
(RQ-0217-KP)

Dear Representative King:

You ask about a groundwater conservation district's authority to amend a historic or existing use permit in specific circumstances.<sup>1</sup> To provide context for your questions, we begin by reviewing the groundwater permitting scheme in chapter 36 of the Water Code.

Chapter 36 grants a district "broad authority to manage, conserve, and protect groundwater resources through rulemaking and permitting." *Guitar Holding Co. v. Hudspeth Cty. Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 912 (Tex. 2008); *see generally* TEX. WATER CODE §§ 36.001–.457 (chapter 36). District rulemaking should "protect property rights [and] balance the conservation and development of groundwater to meet the needs of this state." TEX. WATER CODE § 36.0015(b) (stating districts' purpose). To that end, a district may adopt rules that limit groundwater production according to specified criteria. *Id.* § 36.101(a). When a district adopts such limiting rules, it "may preserve historic or existing use<sup>2</sup> . . . to the maximum extent practicable consistent with the district's management plan" and permitting requirements. *Id.* § 36.116(b); *see also id.* §§ 36.1071 (requiring a district to adopt a groundwater management plan), 36.113 (stating permit requirements).

Districts must require permits for all "drilling, equipping, operating, or completing of wells or for substantially altering the size of wells or well pumps," except when statutes provide otherwise. *Id.* § 36.113(a). A district may require a permit or permit amendment application to state "the nature and purpose of the proposed use and the amount of water to be used for each purpose." *Id.* § 36.113(c)(3). Also, a district may prohibit permit holders from changing how they withdraw or use groundwater unless the district approves the change in a permit amendment. *Id.*

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<sup>1</sup>See Letter from Honorable Tracy O. King, Chair, House Comm. on Agric. & Livestock, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Apr. 5, 2018), <https://www.texasattorneygeneral.gov/opinion/requests-for-opinions-rqs> ("Request Letter").

<sup>2</sup>Chapter 36 defines "[e]vidence of historic or existing use" as "evidence that is material and relevant to a determination of the amount of groundwater beneficially used without waste by a permit applicant during the relevant time period set by district rule that regulates groundwater based on historic use." TEX. WATER CODE § 36.001(29).

§ 36.113(a), (c)(3). Section 36.113 authorizes a district to require applicants for new permits to meet more restrictive requirements than holders of a historic use permit if applied uniformly:

The district may impose more restrictive permit conditions on new permit applications and permit amendment applications to increase use by historic users if the limitations:

- (1) apply to all subsequent new permit applications and permit amendment applications to increase use by historic users, regardless of type or location of use;
- (2) bear a reasonable relationship to the existing district management plan; and
- (3) are reasonably necessary to protect existing use.

*Id.* § 36.113(e).

In *Guitar Holding*, the Texas Supreme Court considered the permissible scope of the exception that a district's rules may make for historic or existing uses. *Guitar Holding*, 263 S.W.3d at 912. The groundwater conservation district in that case granted three types of permits: (1) a validation permit for historic users, (2) a new operating permit, and (3) a permit to transfer water out of the district. *Id.* at 914. The validation permit for historic or existing uses gave the owner the right to produce according to the amount of irrigation that occurred during a prior period but without regard to the applicant's proposed use of water to be produced. *See id.* The rules allowed both historic use permit holders and new operating permit holders to obtain another permit to transfer the water they had a right to produce out of the district, although the holder of a new operating permit had no guarantee of water availability. *Id.* Some owners argued that the statutory requirements for a historic or existing use permit limited the amount of production but did not restrict the proposed use of water to be produced. *Id.* at 915. The Court concluded otherwise, explaining that under the statutes, "[a] district's discretion to preserve historic or existing use is . . . tied both to the amount and purpose of the prior use." *Id.* at 916. The Court decided that under the statutes, when groundwater historically used for irrigation is transferred out of the district, it no longer qualifies for a historic or existing use permit, and the transfer must be treated as a new use subject to the requirements applicable to all new uses. *Id.* at 917-18. Because all new uses must be treated uniformly, the Court concluded that the district rules unlawfully gave preferential transfer rights to holders of historic or existing use permits. *Id.* at 918.

You state that when the Kinney County Groundwater Conservation District proposed new rules for amending historic and existing use permits, various landowners filed responses disagreeing about the scope of the Court's decision in *Guitar Holding*. Request Letter at 4. You inform us that some landowners contend that the opinion "restricts the authorized use of a historic or existing use permit to its historical purpose of use." *Id.* Others argue, you tell us, that *Guitar Holding* concerned only "whether groundwater transferred out of the district was a new use requiring a new permit," and that the opinion does not resolve whether a historic or existing use

permit may be amended to allow other in-district uses provided the historic volume of production remains unchanged. *Id.* (emphasis omitted).

In light of this dispute, you ask: “Following the Supreme Court’s ruling in *Guitar Holding*, can a ‘historic or existing use’ permit be amended to change the purpose of use or place of use?” *Id.* at 1. Although the particular controversy in *Guitar Holding* involved out-of-district transfers, the Court did not limit its holding to those facts. A later opinion by the court reiterated:

In *Guitar Holding Co. v. Hudspeth County Underground Water Conservation District*, we rejected the argument that a district’s discretion in preserving “historic or existing use” was limited to the amount of water permitted. Rather, we said,

the amount of groundwater withdrawn and its purpose are both relevant when identifying an existing or historic use to be preserved. Indeed, in the context of regulating the production of groundwater while preserving an existing use, it is difficult to reconcile how the two might be separated. . . . [B]oth the amount of water to be used and its purpose are normal terms of a groundwater production permit and are likewise a part of any permit intended to “preserve historic or existing use.” A district’s discretion to preserve historic or existing use is accordingly tied both to the amount and purpose of the prior use.

*Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 836 (Tex. 2012). Thus, under *Guitar Holding*, a change in the purpose of the proposed use of water to be produced under a historic or existing use permit is a new use, even if the new use would occur within the district. *See generally Guitar Holding*, 263 S.W.3d at 912–18. Whether a district must treat an application for an amended permit as an application for a new-use permit will depend on the particular facts and is a matter for the district to determine, in the first instance, subject to judicial review. *See id.* (holding that applications to transfer linked to an existing-use permit were nevertheless applications for a new use); TEX. WATER CODE § 36.113 (stating a district’s authority to approve permits and permit amendments).

You also ask whether it is “permissible to amend a permit for ‘historic or existing use’ to authorize a different purpose of use or place of use but remove the historic use protections for the portion of the permit authorizing a different purpose of use or place of use[.]” Request Letter at 1. The answer depends on the kind of amendment or permit that you contemplate. A district has broad regulatory powers within the bounds of its discretion as circumscribed by the statutes. *Guitar Holding*, 263 S.W.3d at 912. Its discretion includes the authority to promulgate “rules limiting groundwater production . . . to provide for conserving, preserving, protecting, and recharging of the groundwater . . . or prevent waste.” TEX. WATER CODE § 36.101(a). A court would likely conclude that a district has sufficient discretion to accept an owner’s surrender of a

portion of the right to produce under a historic or existing use permit, while maintaining protection on the remainder. And a holder could qualify for a new permit for the released portion by meeting the same requirements that any other owner must satisfy to obtain a permit for a new use.

You suggest, however, that you envision a single hybrid application that, while maintaining historic or existing use protections for a portion of the owner's rights to produce, seeks approval of a new use for the remainder. Request Letter at 4–5. A district must apply its new-use requirements uniformly to all requests for new uses, whether the request appears in an application to amend a historic or existing use or in an application for a new use permit. *See Guitar Holding*, 263 S.W.3d at 918. Therefore, a court would likely determine that the uniformity requirements in chapter 36 of the Water Code preclude district rules that would give an advantage to a historic or existing permit holder who seeks new use approval that is not available to other new use permit applicants. *See id.*; TEX. WATER CODE § 36.113(e).

S U M M A R Y

Under the Texas Supreme Court's opinion in *Guitar Holding Co. v. Hudspeth County Underground Water Conservation District No. 1*, a change in the purpose of the proposed use of water to be produced under a historic or existing use permit is a new use, even if the new use would occur within the district. Whether a district must treat an application for an amended permit as an application for a new-use permit will depend on the particular facts and is a matter for the district to determine, in the first instance, subject to judicial review.

A groundwater conservation district may accept a surrender of a portion of rights to groundwater under a historic or existing use permit and allow the holder to retain the remaining rights not surrendered. A holder of a historic or existing use permit who surrenders a portion of rights subject to the permit may seek a new permit for a new use. A court would likely determine that the uniformity requirements in chapter 36 of the Water Code preclude district rules that would give an advantage to a historic or existing permit holder who seeks new use approval that is not available to other new use permit applicants.

Very truly yours,



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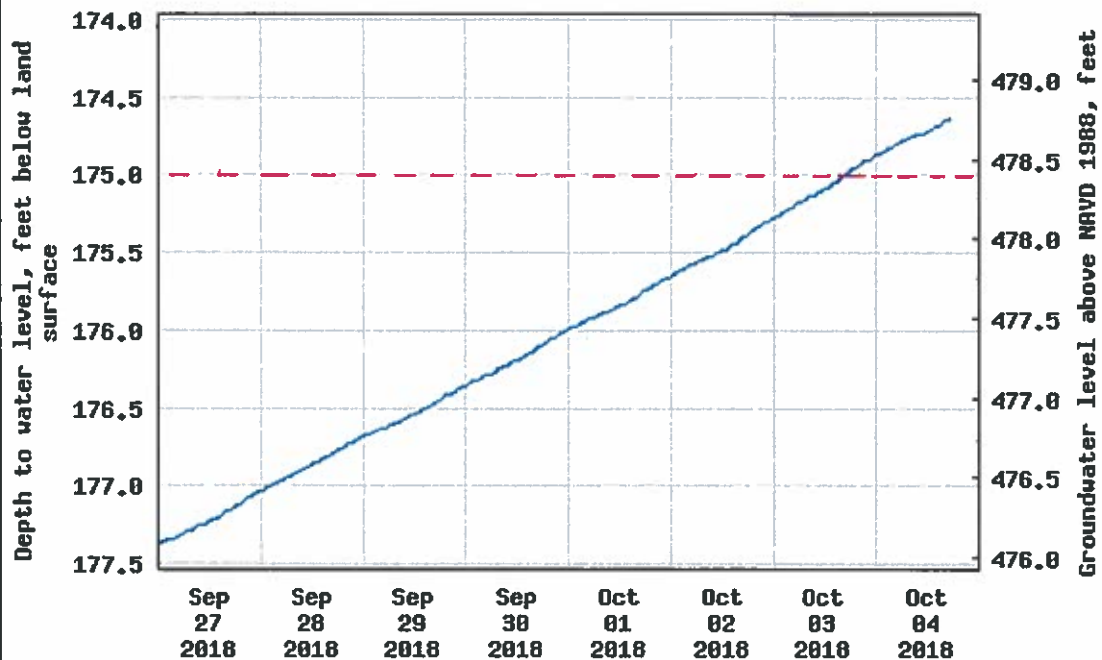
## **Item 4**

### **Board Discussions and Possible Actions**

- a. Discussion and possible action related to a declaration of “No Drought” conditions.**



### USGS 301237097464801 YD-58-50-301 (Lovelady)



----- Provisional Data Subject to Revision -----

## **Item 4**

### **Board Discussions and Possible Actions**

- b. Discussion and possible action related to setting District Objectives for FY 2019.**

**FY 2019 District Objectives**  
**Draft**  
**October 11, 2018**

The following objectives are proposed for Board consideration to guide the District for FY 2019. If adopted, the Board will assess achievement or substantial progress towards these objectives at the end of the fiscal year.

1. Successfully implement Year One of the District's Habitat Conservation Plan, including administration, reporting, education and outreach, monitoring, minimization, mitigation, and research measures.

Lead Team: All Teams

2. Find mechanisms to increase the Contingency Fund towards an amount of \$1,000,000. Develop a proposal to revise the fees charged to permittees for excess pumping – which will be assessed on over-pumpers in September 2019. Continue developing processes that make office operations more efficient and effective, including IT support.

Lead Team: Administrative Team

3. Initiate a plan to determine the sustainable yield of the Trinity Aquifers to continue to make recommendations for sound aquifer management decisions. Develop methodologies for monitoring and evaluating the DFCs of the Trinity Aquifers in the District. Continue to explore alternative sources of water supply.

Lead Team: Aquifer Science Team

4. Develop education and outreach initiatives to raise awareness with all audiences – with a focus on the average citizen - about the District, its mission, key programs, water resources, sensitive areas, and critical habitat using innovative technologies, traditional techniques and other creative strategies. Develop a communication strategy and consistent message that builds mutually beneficial relationships between local organizations and governments and their publics, which helps inform the District of current events and opportunities.

Lead Team: Education & Outreach Team

5. Coordinate efforts, including preparing documents and initiating discussions, to effectively support the District's litigation and legislative priorities. Continue the ongoing efforts to develop ASR Rules and Policies and to complete the design and initiate the implementation of the new integrated database and reporting system.

Lead Team: Regulatory Compliance Team

## **Item 4**

### **Board Discussions and Possible Actions**

**c. Discussion and possible action on possible remand of Needmore LLC permit application to the State Office of Administrative Hearings for further proceedings prior to scheduling a final hearing on the application before the District's board of directors; discussion and possible action on scheduling final hearing on the application.**

## **Item 5**

### **Director's Reports**

#### **Directors' Reports.**

Directors may report on their involvement in activities and dialogue that are of likely interest to the Board, in one or more of the following topical areas:

- **Meetings and conferences attended or that will be attended;**
- **Committee formation and updates;**
- **Conversations with public officials, permittees, stakeholders, and other constituents;**
- **Commendations; and**
- **Issues or problems of concern.**

**Item 6**

**Adjournment**